U.S. Department of Homeland Security
20 Mass. Ave., N.W., Rm. A3042
Washington, DC 20529

U.S. Citizenship and Immigration Services

C1

[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: NOV 03 2004

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Petition for Special Immigrant Religious Worker Pursuant to Section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), as described at Section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C)

ON BEHALF OF PETITIONER:

SELF-REPRESENTED

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Director
Administrative Appeals Office

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

PUBLIC COPY

DISCUSSION: The employment-based immigrant visa petition was denied by the Director, Texas Service Center. The petition is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is a church. It seeks to classify the beneficiary as a special immigrant religious worker pursuant to section 203(b)(4) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(4), to perform services as a missionary. The director determined that the petitioner had not established that the beneficiary had been engaged continuously in a qualifying religious vocation or occupation for two full years immediately preceding the filing of the petition or that it had the ability to pay the beneficiary the proffered wage.

On appeal, the petitioner submitted a brief and additional documentation.

Section 203(b)(4) of the Act provides classification to qualified special immigrant religious workers as described in section 101(a)(27)(C) of the Act, 8 U.S.C. § 1101(a)(27)(C), which pertains to an immigrant who:

> (i) for at least 2 years immediately preceding the time of application for admission, has been a member of a religious denomination having a bona fide nonprofit, religious organization in the United States;
>
> (ii) seeks to enter the United States--
>
> > (I) solely for the purpose of carrying on the vocation of a minister of that religious denomination,
> >
> > (II) before October 1, 2008, in order to work for the organization at the request of the organization in a professional capacity in a religious vocation or occupation, or
> >
> > (III) before October 1, 2008, in order to work for the organization (or for a bona fide organization which is affiliated with the religious denomination and is exempt from taxation as an organization described in section 501(c)(3) of the Internal Revenue Code of 1986) at the request of the organization in a religious vocation or occupation; and
>
> (iii) has been carrying on such vocation, professional work, or other work continuously for at least the 2-year period described in clause (i).

The regulation at 8 C.F.R. § 204.5(m)(1) echoes the above statutory language, and states, in pertinent part, that "[a]n alien, or any person in behalf of the alien, may file a Form I-360 visa petition for classification under section 203(b)(4) of the Act as a section 101(a)(27)(C) special immigrant religious worker. Such a petition may be filed by or for an alien, who (either abroad or in the United States) for at least the two years immediately preceding the filing of the petition has been a member of a religious denomination which has a bona fide nonprofit religious organization in the United States." The regulation indicates that the "religious workers must have been performing the vocation, professional work, or other work continuously (either abroad or in the United States) for at least the two-year period immediately preceding the filing of the petition."

The regulation at 8 C.F.R. § 204.5(m)(3) states, in pertinent part, that each petition for a religious worker must be accompanied by:

> (ii) A letter from an authorized official of the religious organization in the United States which (as applicable to the particular alien) establishes:
>
> > (A) That, immediately prior to the filing of the petition, the alien has the required two years of membership in the denomination and the required two years of experience in the religious vocation, professional religious work, or other religious work.

The petition was filed on January 13, 2003. Therefore, the petitioner must establish that the beneficiary was continuously working as a missionary throughout the two-year period immediately preceding that date.

The petitioner stated that the beneficiary began working for the petitioning organization in August 2000 as a missionary, and works an average of 55 hours per week. The petitioner submitted a detailed description of the beneficiary's work and submitted copies of Form 1099-MISC issued by it to the beneficiary for the years 2000, 2001 and 2002.

The director determined that, as the beneficiary had worked as an independent contractor for the petitioner, it could not be established that the beneficiary had worked continuously in the religious occupation for two full years preceding the filing of the visa petition.

The legislative history of the religious worker provision of the Immigration Act of 1990 states that a substantial amount of case law had developed on religious organizations and occupations, the implication being that Congress intended that this body of case law be employed in implementing the provision, with the addition of "a number of safeguards . . . to prevent abuse." See H.R. Rep. No. 101-723, at 75 (1990).

The statute states at section 101(a)(27)(C)(iii) that the religious worker must have been carrying on the religious vocation, professional work, or other work continuously for the immediately preceding two years. Under former Schedule A (prior to the Immigration Act of 1990), a person seeking entry to perform duties for a religious organization was required to be engaged "principally" in such duties. "Principally" was defined as more than 50 percent of the person's working time. Under prior law a minister of religion was required to demonstrate that he/she had been "continuously" carrying on the vocation of minister for the two years immediately preceding the time of application. The term "continuously" was interpreted to mean that one did not take up any other occupation or vocation. *Matter of B*, 3 I&N Dec. 162 (CO 1948).

On appeal, the petitioner states that, although it has paid the beneficiary in the past as an independent contractor, the beneficiary is really an employee based on the twenty factors test established by the Internal Revenue Service (IRS). The petitioner further states that it has changed the reporting status for its missionaries, and will not report them to the IRS as employees rather than as independent contractors. The petitioner submitted a letter from a Certified Public Accountant, who he states that he advised the petitioner that its missionaries were indeed employees instead of independent contractors, and that the petitioner needed to change its reporting status for these individuals. The petitioner also submitted copies of what it indicates

are paycheck stubs for the beneficiary from January 2003 through September 2003, reflecting that it now compensates the beneficiary as an employee and deducts the appropriate tax withholdings from her paycheck. Although the petitioner submitted copies of its Form 941, Employer's Quarterly Federal Tax Return, dated June 26, 2003 and July 31, 2003, they provide no conclusive evidence that the petitioner has included the beneficiary in its reports of wages and other compensation.

The statute requires that an alien must be seeking entry into the United States to work for a bona fide religious organization. That requirement is not met when the individual is self-employed as the individual works for him/herself. Therefore, self-employment is not qualifying employment for purpose of this visa preference classification. However, under certain circumstances, self-employment may be qualifying employment for purposes of establishing the two years required work experience.

We find that, in the present case, the evidence is sufficient to establish that the beneficiary's prior employment as an independent contractor is qualifying employment to establish experience in the religious occupation. Nonetheless, the evidence does not establish that the beneficiary worked continuously as a missionary for two full years immediately preceding the filing of the visa petition.

The evidence reflects that the beneficiary suffered an accident in June 2001 in her home country of Belize and did not return to work for the petitioner until November 2001. The petitioner states that it did not pay the beneficiary for the time she was away from work. The beneficiary states that she was on unpaid leave from the petitioner and did not work for anyone else during this time frame. Thus the beneficiary was not employed from June to November 2001.

The evidence does not establish that the beneficiary worked continuously in the religious occupation for two full years prior to the filing of the visa petition.

The petitioner must also establish that it has the ability to pay the proffered wage. The regulation at 8 C.F.R. § 204.5(g)(2) states in pertinent part:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner stated that it compensates the beneficiary at the rate of $14,400 per year ($900 per month in salary and $300 per month in rent and utilities). The petitioner included copies of canceled checks reflecting that it paid the beneficiary $1,200 in January 2002 and $900 per month for the remainder of the year. The pay stubs submitted by the petitioner reflects that it paid the beneficiary $1,115.80 per month during the months of January through September 2003. On appeal, the petitioner also submitted a copy of an audited financial statement for the period ending June 2003.

The record is sufficient to establish that the petitioner has the ability to pay the beneficiary the proffered wage. However, as the petitioner has not established that the beneficiary worked continuously in the religious occupation for two full years prior to the filing of the petition, the petition may not be approved.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.